Town of Lexington, Massachusetts

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In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

REPLY COMMENTS OF THE BOARD OF SELECTMEN,
TOWN OF LEXINGTON, MASSACHUSETTS

INTRODUCTION

The Board of Selectmen (the "Board"), as the Local Franchising Authority ("LFA") for the Town of Lexington, Massachusetts, appreciates this opportunity to file Reply Comments on the Second Further Notice and Proposed Rulemaking ("FNPRM") in the above-referenced docket. Lexington is fortunate to have three competitive cable operators with a high collective "take rate" and an active PEG access corporation with strong community interest. Accordingly, the Board concurs with the issues raised by a number of other LFAs in their comments, especially regarding the negative impact on communities that would result from the Commission's proposed treatment of the in-kind contributions LFAs have historically required of cable operators, and regarding the benefits these in-kind contributions provide to the community at large and not just to an LFA itself. We particularly note and support the comments of the Quad Cities Cable Communications Commission[1], Anne Arundel County *et al*[2]., the City of Fullerton[3], the City of New York[4], and Charles County, Maryland.[5]

The Board offers the following additional comments, specific to our situation in Lexington:

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[1] *Comments of the Quad Cities Cable Communications Commission,* https://ecfsapi.fcc.gov/file/1109103365954/Comments of the Quad Cities Cable Communications Commission.pdf

[2] *Comments of Anne Arundel County, et al.,* https://ecfsapi.fcc.gov/file/1115723504888/LFA COMMENTS IN OPPOSITION.pdf

[3] Letter from Kenneth A. Domer, City Manager, City of Fullerton, CA, https://ecfsapi.fcc.gov/file/111558454876/Cabe Franchise Fee Deductions Ltr_111518.pdf

[4] *Comments of the City of New York,* https://ecfsapi.fcc.gov/file/111566340172/NYC Comments in Response to 2018 Cable Second FNPRM.pdf

[5] *Comments of Charles County, Maryland*, https://ecfsapi.fcc.gov/file/1115572328794/v5.0-FINAL-FILED-CHARLES-COUNTY-FORMAL-COMMENTS-FCC-FNPRM-Nov-14-2018.pdf

1. **Measures intended to promote new entrants in areas with no or limited competition will have negative consequences in areas where competition is already strong.**

The Town of Lexington is fortunate to have had vibrant competition since 2006 among three cable television franchisees, who are also broadband providers. We have strived, in both our initial franchise and license renewal negotiations, to keep our cable operators on as even—and competitive—a playing field as we can. Each of our operators has stepped up to provide comparable in-kind contributions that provide clear benefit to our community, separate from the 5% franchise fee.

These in-kind contributions and franchise fees have never been a substantive impediment in our license negotiations, whether for an initial license for a new entrant or for a renewal license for an incumbent. Nor has there been any indication by any of our franchisees that the required contributions have reduced their willingness to invest in new technologies and service offerings in our Town.

Industry trends, particularly subscriber "cord-cutting" and the potential for so-called 5G fixed wireless to replace traditional cable as a means for program delivery, suggest that it is unlikely that another new entrant would, now or in the future, seek to become a *fourth* cable television franchisee in our Town. (Of course, were such an entrant to appear, we would offer that entrant terms substantially similar to those in our incumbent operators' licenses.)

We understand the Commission's concern that there are, today, areas of the country with little or no competition, and we understand the Commission's motivation to limit and reduce apparent regulatory barriers to entry in such areas. We also understand the Commission's desire to extend those limits to the incumbent provider(s) in order to level the playing field in such areas. And, further, we understand the Commission's hope that such limits would encourage operators' investment in infrastructure, in areas where they have been reluctant.

But as is so often the case, one "size" does not fit all. Specifically, in situations such as we have in Lexington, where there *already* are multiple providers, with meaningful competition and willing investment in infrastructure, the Commission's proposal to treat in-kind contributions within the 5% franchise fee limit would achieve *no* competition- or investment-encouraging objective, for no such encouragement is needed.

2. **With the proposed change in treatment of in-kind contributions, subscribers would continue to pay, while cable operators—not the community—would benefit.**

Today, the franchise fee appears as a "line item" fee on a subscriber's cable bill, while the cost of a cable operator's in-kind contributions is borne, separately, by the cable operator. With the Commission's proposed change, the franchise fee would likely *remain* at the 5% limit, Subscribers would pay the same amount they do today, thus shifting the cost burden of in-kind contributions from the operator to subscribers. In effect, this would *reimburse* cable operators for their in-kind contributions, and would simultaneously *reduce* the PEG funding that, as many commenters have eloquently stated, is so beneficial and valuable to our communities.

3. **Changes affecting incumbent cable operator licenses should take affect only at the time of license renewal.**

As other LFAs have noted, the provisions in incumbent cable operator franchise licenses were mutually agreed to by the parties, and were intended to last for the entire license term. The Board believes that any changes made by the Commission affecting cable operator licenses should be deferred, for incumbent licensees, until license renewal, so that such changes may be taken into account in renewal negotiations between the incumbent operator and the LFA.

4. **It is inappropriate to value in-kind contributions at "fair market" or "retail" value, as many such arrangements are unique to the provider-LFA relationship, are not offered commercially, or are otherwise difficult to value.**

The Commission seeks comments on its proposal that "cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value." We join with Charles County, Maryland, among others, in noting that "fair market value" is inappropriate. We also note that determining the monetary value of these in-kind contributions will likely be quite difficult.

First, the nature of many cable-related in-kind contributions is such that they are not typically offered commercially by a cable operator, and therefore have no established fair market value. These include video uplinks to carry PEG programming from municipal and community facilities to a PEG studio, and cable system channel capacity dedicated to PEG programming. (With regard to the latter, we note that cable operators typically pay retransmission fees to programming providers to carry their content; they do not typically *charge* programming providers for the privilege of having their content carried).

Second, operators offer cable service to residential and business subscribers on a variety of price plans, promotional and otherwise. These plans are always changing, and it is well known that a subscriber can frequently reduce their cable bill by making a new term commitment or simply by threatening to switch to a competitive cable operator. The default listed price of cable service is inevitably the most expensive, and is a price that few subscribers actually pay. It is therefore inappropriate to use the retail price or fair market value of an individual residential or business cable service drop as the basis for valuation of a franchise agreement's required "free" cable drops.

Third, in addition to the actual infrastructure costs of providing a cable drop, the cost basis of service provided to subscribers includes costs for sales and marketing, call centers, customer service, billing, etc. As these elements are not involved in the provision franchise-required drops, the actual cost of such drops should be much less than the operator's cost basis for conventional "retail" service drops.

The Board believes that the monetary value, if any, ascribed to in-kind contributions must be subject to negotiation between the LFA and the franchisee, and embodied in the resulting franchise license agreement.

5. **The industry is undergoing rapid technological change in the way video programming is delivered; without knowing how these trends will ultimately play out, it is premature for the Commission to preempt LFAs from regulating mixed-use networks that may well be the delivery vehicle for tomorrow's video programming content.**

Cable operators are already seeing a decline in the number of subscribers to conventional "linear" cable television, as "cord-cutters" increasingly turn to streaming video services and other means of delivering video programs that have traditionally been carried over linear cable. As the Commission notes, Congress, in the Cable Act, gave LFAs the ability to regulate cable operators' delivery of "video programming." What happens if an operator chooses to move delivery of its video programming services from linear cable to an Internet Protocol (IP)-based network? What if that IP-based network is a mixed-use network? Or, what happens if an operator moves delivery of its video programming to a fixed wireless network? What if that fixed wireless network also provides the subscriber with Internet access?

Does the mere fact that the mechanism for delivery of video programming—which the Cable Act empowers LFAs to regulate—moves from conventional linear cable to another technology that, in some contexts, is not regulated by LFAs, mean that the delivery of that same video programming is no longer subject to regulation by the LFA? Would this also mean that delivery of video programming by such means would no be longer subject to franchise fees, driving communities' "PEG revenues" to zero? What regulatory changes would be required

to enable PEG revenues associated with the delivery of video programming services to continue, benefitting communities nationwide?

The Board believes the answers to these substantive questions are, today, not at all obvious; they can only be answered as the technology picture becomes more clear. These questions therefore merit ongoing discussion as the technological landscape continues to evolve. The Board therefore urges the Commission to defer any action to preempt LFA regulation of mixed-use networks until the answers to these questions are well understood.

CONCLUSION

For the reasons stated above, the Board of Selectmen of the Town of Lexington, Massachusetts joins with other LFAs in opposing the changes outlined in the Commission's FNPRM, especially regarding the treatment of cable operators' in-kind contributions. The Board respectfully thanks the Commission for the opportunity to submit these reply comments in response to the FNPRM.

Respectfully submitted,

Board of Selectmen
Town of Lexington, Massachusetts

Suzanne E. Barry

Chairman